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RE LAI HEE SANG, EX P ASIA COMMERCIAL FINANCE (M) BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[BANKRUPTCY NO: 29-1212 OF 1989]
b 27 JANUARY 2000

BANKRUPTCY: *Capacity of bankrupt - Application by bankrupt for extension of stay of bankruptcy proceedings - Whether bankrupt could maintain application for stay - Whether application should be sanctioned*
c *by official assignee*

CIVIL PROCEDURE: *Stay of proceedings - Bankruptcy proceedings - Application for extension of stay - Whether awaiting outcome of pending civil suit sufficient grounds for extending stay*

d This was an appeal by the judgment creditor ('JC') against the decision of the senior assistant registrar ('SAR') wherein the SAR extended the stay of the bankruptcy proceedings against the judgment debtor ('JD').

Held:

e **[1]** Since the JD was a bankrupt and had not obtained his discharge, the JD had no capacity to maintain his application for a stay of proceedings by virtue of the Bankruptcy Act 1967. Also, there was no evidence to show that the official assignee had sanctioned the JD to make the said application. As such, the said application should be dismissed.

f **[2]** The bankruptcy notice issued against the JD was in full compliance with the Bankruptcy Rules 1969 and the receiving and adjudication orders that were made against the JD were regular. Also, there was an inordinate delay on the part of the JD to file an application for the extension of the stay of the bankruptcy proceedings.

g **[3]** There were no special circumstances in favour of the JD to support the SAR's decision to extend the stay of the bankruptcy proceedings. To await for the outcome of a pending civil suit was not a reason that ought to be accepted in deciding whether the extension of the stay of the bankruptcy
h proceedings should be allowed or not. The JC should not be deprived of pursuing the matter especially when receiving and adjudication orders were made against the JD.

[Appeal allowed.]

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Case(s) referred to:

Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru [1995] 4 CLJ 339 ***(refd)***
Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors [1991] 1 MLJ 111 ***(refd)***
Atwood v. Chichester [1878] 3 QBD 727 ***(refd)***
Auckland Harbour Board v. Kaihe [1962] NZLR 68 ***(refd)***
Ban Huat Seng Co. Ltd v. Lee Poh Soo [1967] 1 MLJ 145 ***(refd)***
Central London Property Trust Ltd v. High Trees House Ltd [1947] KB 130 ***(refd)***
Connelly v. DPP [1964] AC 1254 ***(refd)***
Cooper v. Hall [1968] 1 WLR 360 ***(refd)***
Costellow v. Somerset County Council [1993] 1 All ER 952 ***(refd)***
Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim [1999] 5 CLJ 582 ***(refd)***
Earl of Darnley v. London, Chatham and Dover Rly Co (Proprietors etc) [1867] LR 2 HL 43 ***(refd)***
Eaton v. Storer [1882] 22 Ch D 91 ***(refd)***
Griffiths v. Benn [1911] 27 TLR 346 ***(refd)***
Hj Mohamed bin Suboh v. Devadas [1981] 1 MLJ 136 ***(refd)***
Idris bin Haji Salleh v. Federal Auto Holdings Bhd [1979] 2 MLJ 141 ***(refd)***
In re a Debtor ex p, Debtor [1935] 1 Ch 353 ***(refd)***
Jones v. Curling [1884] 13 QBD 262 ***(refd)***
Jumari Mohamed v. PP [1982] 1 MLJ 282 ***(refd)***
Keymer v. Reddy [1912] 1 KB 215 ***(refd)***
KS Chua & Co v. Chui Miang Chew & Ors [1996] 2 CLJ 676 ***(refd)***
Lloyd Triestino Societa v. Chocolate Products (Malaysia) Sdn Bhd [1978] 2 MLJ 27 ***(refd)***
Malaysia Building Society Bhd v. Lim Kheng Kim & Ors [1988] 3 MLJ 175 ***(refd)***
Monk v. Bartram [1891] 1 QB 346 ***(refd)***
Nawab SN Ally Khan v. Rajah O Khan [1865] LR 1 PC 8 ***(refd)***
Nicoll v. Allen [1862] 31 LJ QB 283 ***(refd)***
Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd [1984] 2 MLJ 143 ***(refd)***
Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors [1988] 1 MLJ 178 ***(refd)***
Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 ***(refd)***
Re Hinchcliffe [1895] 1 Ch 117 ***(refd)***
Samuels v. Linzi Dresses Ltd [1981] QB 115 ***(refd)***
Saunders v. Pawley [1885] 14 QBD 234 ***(refd)***
Scafer v. Blyth [1920] 3 KB 140 ***(refd)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] MLJ 116 ***(refd)***
Supreme Finance (M) Bhd v. Mohamad Noor (t/a Everway Food Centre) & Ors [1993] 2 MLJ 29 ***(refd)***
Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd [1954] 2 All ER 28 ***(refd)***
Tropiland Sdn Bhd v. DCB Bank Bhd & Ors [2000] 2 MLJ 65 ***(refd)***
Tuck v. Southern Counties Deposit Bank [1889] 42 Ch D 471 ***(refd)***
Veerasingham v. PP [1958] MLJ 76 ***(refd)***
Wilson v. Church (No 2) [1879] 12 Ch D 454 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1), 97
Rules of the High Court 1980, O. 3 r. 5(1), (2), O. 41 r. 11(1), O. 92 r. 4

For the judgment creditor - Norliza Ibrahim; M/s TS Chong & Co
For the judgment debtor - C Kumareson; M/s Saga, Raja & Kumar

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak J:

Introduction

This was an appeal by Asia Commercial Finance (M) Berhad – the judgment creditor, against the decision of the senior assistant registrar ('SAR') dated 8 August 1998 wherein the SAR ordered that the bankruptcy proceedings against Lai Hee Sang – the judgment debtor, be stayed until 31 December 1998. The judgment creditor's appeal to the judge in chambers dated 10 August 1998 can be seen in encl. 52.

Facts

It would be germane, in order to garner and obtain a perspective of the appeal in encl. 52, to highlight certain salient facts. For this exercise, reference to an affidavit in reply affirmed by Gan Chee Poh – the manager of the judgment creditor's branch office in Johor Bahru, should be made. Gan Chee Poh's affidavit in reply was affirmed on 24 February 1997 as reflected in encl. 41. The judgment debtor too affirmed an affidavit on 3 December 1997 as seen in encl. 39A which was in support of his application for a stay of proceedings as seen in encl. 39.

The judgment debtor was declared a bankrupt by the Johor Bahru High Court on 5 December 1996 when the receiving and adjudication orders were issued against him for his failure to comply with the requirements of a bankruptcy notice no: 1131/89 dated 30 December 1989 (encl. 3) which was issued against him at the request of the judgment creditor. That bankruptcy notice was duly served on the judgment debtor on 23 January 1990 as reflected in encl. 5. Since the judgment debtor was a bankrupt and had not obtained his discharge, the judgment debtor – by virtue of the provisions of the Bankruptcy Act 1967, had no capacity to maintain his application for a stay of proceedings as reflected in encl. 39. On perusal of the affidavit in encl. 39A, there was an absence of an averment to show that the official assignee had sanctioned the judgment debtor to make the application for a stay of proceedings in encl. 39. Thus, the only reasonable inference to arrive at would be that no sanction was ever sought nor given and that being the case the application in encl. 39

should be dismissed *in limine*. This meant that the appeal in encl. 52 should be allowed with costs. It would be futile for the judgment debtor to argue otherwise. In *Supreme Finance (M) Bhd v. Mohamad Noor (t/a Everway Food Centre) & Ors* [1993] 2 MLJ 29, the court had to deal with the issue of whether the bankrupt required the sanction of the official assignee under s. 38(1) of the Bankruptcy Act 1967 in order to proceed with the application to set aside the judgment in default of appearance. At p. 32 to p. 33 of the report, Zakaria Yatim J (as he then was) had this to say:

> In my opinion, the only way in which a bankrupt can contest a judgment is to apply to the bankruptcy court for an order to rescind and annul the receiving and adjudication orders. In his application to the bankruptcy court, he can ask the court to annul and rescind the receiving and adjudication orders on the ground that the judgment was obtained by fraud, or collusion or there has been miscarriage of justice or on any other ground. The bankruptcy court will go behind the judgment if there is evidence that the judgment has been obtained by fraud or collusion or that there has been some miscarriage of justice (see *Re Flatau, ex p Scotch Whisky Distillers Ltd* [1888] 22 QBD 83).
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> The situation in the present case is therefore different from that in *Re Sebastian, ex p Metroplex Leasing & Credit Corp Sdn Bhd* [1990] 3 MLJ 248.
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> In the present case, it is my view that the words, '… shall be incompetent to maintain any action …' in s. 38(1)(a) of the Act refer not only to writ action or any of the proceedings under O. 5 r. 1 but also refer implicitly to an application to set aside judgment in default. While the receiving and adjudication orders stand, the third defendant cannot contest the petitioning creditors judgment in any other court except the bankruptcy court. As a bankrupt he has no *locus standi* to file the present application. (*Boaler v. Power & Ors* [1910] 2 KB 229). See also *The Metropolitan Bank Ltd and Arthur Cooper v Alexander Gopsell Pooley* [1885] 10 App-Cas 211).
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> Since the third defendant is an undischarged bankrupt, he is therefore not competent to apply to set aside the default judgment and to file the present appeal without the previous sanction of the official assignee.
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> For the reasons stated above, the appeal is dismissed with costs.
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> *Appeal dismissed.*

I have since perused through the file and I have no hesitation to say that the bankruptcy notice issued against the judgment debtor was in full compliance with the Bankruptcy Rules 1969 and that the receiving and adjudication orders that were made against the judgment debtor were regular. The headnote to the case of *In re a Debtor, Ex p Debtor* [1935] 1 Ch 353 reads as follows:

> Bankruptcy being a matter which affects not only the debtor and his creditors but also the general public, a duty is imposed upon the court to see that all the requirements of the Bankruptcy Act 1914 and the rules have been observed.

On 28 December 1988, the judgment creditor entered judgment in default of appearance against the judgment debtor in relation to civil suit no: 23-560-1987 that was brought by the judgment creditor against the judgment debtor and one Hamzani bin Badar ("Hamzani") in the High Court of Johor Bahru for a sum of RM1,596,757.67 being the amount owing by the judgment debtor to the judgment creditor as at 28 February 1987 under a guarantee agreement executed by the judgment debtor and Hamzani in favour of the judgment creditor for a loan of RM2 million granted by the judgment creditor to one Kimden Housing Development Sdn Bhd as the borrower. In due course, the judgment creditor had caused to be issued against the judgment debtor a request for issue of bankruptcy notice (encl. 2, dated 30 December 1989) and a bankruptcy notice dated 30 December 1989 as seen in encl. 3. The bankruptcy notice was duly served on the judgment debtor on 23 January 1990 by way of a personal service and this was clearly evident by the affidavit of service of the bankruptcy notice on the judgment debtor that was affirmed by the process server by the name of Hamzah bin Mohd Aris on 23 January 1990.

The judgment debtor was quite stubborn. He refused and failed to comply with the requirements of the bankruptcy notice and so an act of bankruptcy was committed by the judgment debtor on 31 January 1990. This prompted the judgment creditor to file the creditor's petition on 26 March 1990 as reflected in encl. 7. The creditor's petition was duly served on the judgment debtor on 3 May 1990 by way of a personal service as evident by the affidavit of service by the process server Hamzah bin Mohd Aris that was affirmed on 3 May 1990. The judgment debtor then applied to the court to set aside the judgment in default of defence that was entered against him by the judgment creditor on 28 December 1988 by way of a summons in chambers dated 30 September 1990 in civil suit no: 23-560-1987. On 23 October 1990, when the judgment debtor's application came up for hearing, the SAR ordered that the judgment in default of appearance entered against the judgment debtor on 28 December 1988 be set aside. The judgment creditor swiftly acted by filing an appeal to the judge in chambers against the decision of the SAR that was made on 23 October 1990 and this was by way of a notice of appeal dated 24 October 1990 – which appeal was fixed for hearing on 3 April 1991. Thus, at the hearing of the creditor's petition that was fixed on 24 October 1990, it was adjourned *sine die* pending the outcome of the judgment creditor's appeal to the judge in chambers.

On 8 November 1992, the judgment creditor's appeal to the judge in chambers was allowed. The judgment debtor through his solicitor's letter dated 9 November 1992 had requested the learned judge who had made that order on 8 November 1992 to hear further arguments in open court but the learned judge swiftly issued a certificate dated 12 November 1992 stating, categorically,

that no further argument was needed. Being aggrieved, the judgment debtor had appealed to the Federal Court of Malaysia against the decision of the learned judge that was made on 8 November 1992. The Federal Court heard that appeal on 26 July 1994, and forthwith dismissed the judgment debtor's appeal with costs.

The judgment debtor then proceeded to file on 14 January 1995 an affidavit in support of an application to set aside the bankruptcy notice as seen in encl. 14. A few postponements took place and, finally, the judgment debtor's application in encl. 14 was heard on 5 December 1996 wherein the court dismissed the application. The receiving and adjudication orders were then issued against the judgment debtor on 5 December 1996, and on that date henceforth the judgment debtor was made a bankrupt.

I am of the considered view that the dismissal of the judgment debtor's application for setting aside the bankruptcy notice as seen in encl. 14 was correctly made because the judgment debtor was already time barred at the time of his application. From the facts, it was clear that the bankruptcy notice was duly served on the judgment debtor on 23 January 1990. The judgment debtor, had under the Bankruptcy Act 1967, seven days after the service of the bankruptcy notice on him, to comply with or otherwise notify the court that he had a counterclaim, a set-off, or cross-demand which equals or exceeds the judgment sum. In my judgment, the application to set aside the bankruptcy notice in encl. 14 was made approximately five years after the service of the bankruptcy notice on the judgment debtor and, consequently, there was non-compliance with the provisions of the Bankruptcy Act 1967 by the judgment debtor.

On 17 January 1997, the judgment debtor filed a summons in chambers as seen in encl. 39 wherein he applied for a stay of proceedings pending the final decision of civil suit no: D2-22-287-92 at the Kuala Lumpur High Court. The judgment debtor himself affirmed an affidavit on 3 December 1997 in support of encl. 39 and that affidavit, as I said, has been marked as encl. 39A and it was also filed on 17 January 1997. In due course, to be precise on 14 May 1997, the judgment debtor's application in encl. 39 came up for hearing before the SAR and the latter made an order that all proceedings be stayed until 31 December 1997. The judgment debtor, acting cautiously, then filed another summons in chambers on 1 April 1998 as seen in encl. 50 for the purpose of obtaining an order from the court to extend the stay of the bankruptcy proceedings from 31 December 1997 until the final decision of the civil suit no: D2-22-287-92 at the Kuala Lumpur High Court. The judgment debtor's application in encl. 50 was supported by his own affidavit that was affirmed on 27 March 1998 and filed on 1 April 1998 as

seen in encl. 50A. Enclosure 50 was scheduled to be heard on 17 April 1998 but somehow it was heard on 8 August 1998 and the SAR made an order, *inter alia*, to extend the stay of the bankruptcy proceedings until 31 December 1998. The judgment creditor was not happy with the decision of the SAR and by way of encl. 52, an appeal to the judge in chambers was filed.

Arguments Of The Parties – And The Exposition Of The Law

Madam Norliza bte Ibrahim, learned counsel for the judgment creditor, drew my attention to encl. 50 and she rightly submitted that the judgment debtor's application for an extension of the stay of bankruptcy proceedings should have been dismissed by the SAR because there was an undue delay in filing encl. 50. The judgment debtor advanced two reasons for that delay in his affidavit in encl. 50A especially at para. 6 thereof and those reasons were this: that he did not receive any letter from his lawyer who had expressed an intention to extend the duration of the stay of the proceedings and that by the time he knew about the whole matter it was in the month of February, 1998 and there was thus a delay. It must be recalled that encl. 50A was only affirmed on 27 March 1998 and the contents therein were not complex nor complicated. It can therefore be surmised that a plain and simple affidavit was only affirmed on 27 March 1998 even though the judgment debtor alleged that he had received a letter from his solicitor in February 1998. It must be emphasised that the judgment debtor had failed to exhibit the letter from the solicitor in order to bolster up the contention of the judgment debtor that he had indeed received the letter in question from his solicitor. Mr. C. Kumareson, learned counsel for the judgment debtor, submitted that it was not a material factor in not exhibiting the letter from the solicitor and he strongly urged this court to accept the sworn affidavit evidence of the judgment debtor in encl. 50A. With due respect, the failure to exhibit the letter from the solicitor must be construed adversely against the judgment debtor. Order 41 r. 11(1) of the Rules of the High Court 1980 ('RHC') states that:

> Any document to be used in conjunction with an affidavit must be exhibited and a copy thereof annexed to the affidavit.

and surely that very letter – of crucial importance to the judgment debtor should have been exhibited in encl. 50A and a mere reference to that letter at para. 6 of the affidavit in encl. 50A was insufficient. In my judgment, O. 41 r. 11(1) of the RHC is couched in a mandatory fashion and the judgment debtor has no choice but to exhibit that letter. The word "must" that appears in O. 41 r. 11(1) of the RHC should be construed to be of an imperative nature and it admits of no discretion at all (*Nicoll v. Allen* [1862] 31 LJ QB 283; and *Cooper v. Hall* [1968] 1 WLR 360). An affidavit plays a crucial role in an interlocutory proceeding. It determines the matter without the need

to hear evidence in open court. Whatever document that is exhibited in an affidavit, it becomes part and parcel of that affidavit. It follows that anyone who has the right to see the affidavit has also the right to see the document that is exhibited and annexed to the affidavit (*Re Hinchcliffe* [1895] 1 Ch 117). In the body of the affidavit itself, reference to the document is often made and that document will invariably be exhibited as an exhibit. This was what had happened in encl. 50A at para. 6 thereof but, alas, the letter in question was not exhibited nor annexed thereto. Such a failure must be construed adversely against the judgment debtor. This was my judgment and I so hold accordingly.

Be that as it may, calculation-wise the delay in filing the summons in chambers in encl. 50 for the purpose of extending the stay of the bankruptcy proceedings from 31 December 1997 until the final decision of the civil suit no: D2-22-287-92 at the High Court of Kuala Lumpur was exactly three months – calculated from the expiration of the stay of proceedings on 31 December 1997 till the date of the filing of encl. 50 on 1 April 1998. It cannot be denied that the court is empowered under O. 3 r. 5(2) of the RHC to extend the time for the stay of proceedings despite the fact that encl. 50 was not made until after the expiration of the stipulated period but the discretion to extend time must be judiciously exercised. Section 97 of the Bankruptcy Act 1967 enacts that:

> The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, either altogether or for a limited time, on such terms and subject to conditions as the court thinks just.

The Federal Court in the case of *Hj Mohamed bin Suboh v. Devadas* [1981] 1 MLJ 136 FC had occasion to deal with the question of an extension of time to serve the memorandum of appeal to the respondent and this was what Wan Suleiman FJ said at p. 139 of the report:

> The decision as to what constitutes sufficient ground for the delay necessarily involves the exercise of judicial discretion. In this court, on an application for special leave to appeal out of time, the mistake of a legal adviser has been held to be not a sufficient ground for granting special leave (see *Chong Kueng Ying & Ors. v. Lovis Lavagna* [1972] 1 MLJ 180). Similarly it was held in *Chin Hua Sawmill Co. Sdn. Bhd. v. Tuan Yusoff bin Tuan Mohamed* [1974] 1 MLJ 58 that the failure to serve a notice of appeal on the respondent within the prescribed period owing to a mistake of a solicitor was not a ground for granting special leave.
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> What Thomson C.J. said of judicial discretion in *Veerasingam v. Public Prosecutor* [1958] MLJ 76, 79, though that was a criminal reference, applies with equal force to matters of civil procedure, and we quote:

> Clearly, to exercise his discretion properly the judge must apply his mind to all the relevant material. He must consider the circumstances of the original trial. He must consider the original Petition of Appeal. And he must consider the circumstances which are now urged upon him to induce him to allow any departure from or addition to that original Petition of Appeal. He must consider his own powers as to such matters as the granting of adjournment and the requiring of Notice to be given. And then he must exercise his discretion as he sees fit in order that substantial justice may be done in the matter. It may be that he may find it helpful to look at what has been done in some other case by some other judge but if he does he must be careful to look at what that other judge has done merely as an illustration and not as laying down any judicial precedent.

With respect we agree with the learned judge that no sufficient ground has been advanced for the delay as to incline him to exercise his discretion in favour of the appellant.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

and using these passages as springboards, it was correctly argued by Madam Norliza bte Ibrahim to the effect that the judgment debtor did not advance sufficient ground for the delay to justify an extension in his favour. Although the case of *Hj Mohamed bin Suboh v. Devadas (supra)* was not related to a stay of the bankruptcy proceedings, yet the principles enunciated therein are of general application.

It is a correct statement of the law to say and I so say that the court has always been vested with the power to make an order for the extension or abridgment of time. That this is so is clearly demonstrated by O. 3 r. 5(1) of the RHC. However, the applicant must show that the extension of time does not cause any real risk of prejudice to the opposite party, which prejudice could readily be compensated by an award of costs (*Costellow v. Somerset County Council* [1993] 1 All ER 952 at 959). The court must exercise its discretion properly (*Veerasingham v. PP* [1958] MLJ 76 at 79, CA; *Jumari bin Mohamed v. PP* [1982] 1 MLJ 282 at 283; *Jones v. Curling* [1884] 13 QBD 262 at 271; *Scafer v. Blyth* [1920] 3 KB 140 at 143; and *Saunders v. Pawley* [1885] 14 QBD 234 at 237). It must also be shown that the applicant's conduct is *bona fide* (*Atwood v. Chichester* [1878] 3 QBD 727, CA; *Ban Huat Seng Co. Ltd v. Lee Poh Soo* [1967] 1 MLJ 145 at 147; *Idris bin Haji Salleh v. Federal Auto Holdings Bhd* [1979] 2 MLJ 141 at 143; and *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 3 MLJ 175 at 184). However, an excessive delay would certainly prevent the grant of an extension of time (*Eaton v. Storer* [1882] 22 Ch D 91). The courts have been magnanimous and would be inclined to grant the extension provided the opposite

party may be compensated by costs (echoing the gist of the words of Bramwell LJ in *Costellow v. Somerset County Council* [1993] 1 All ER 952, CA). The case of *Eaton v. Storer (supra)* was a case involving an enlargement of time to file a reply to the statement of defence. Here, in the present appeal in encl. 52 it was in regard to the extension of the stay of the bankruptcy proceedings. I have in the case of *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 5 MLJ 241 referred to the cases of *Eaton v. Storer (supra)* and *Atwood v. Chichester (supra)* and it would be ideal to refer to that case. At p. 248 to p. 250 of *Punca Klasik Sdn Bhd v. Seok Kim Leow (supra),* I had said:

> In *Eaton v. Storer* [1882] 22 Ch D 91 it was argued that the delay in filing so simple a pleading as a mere joinder of issue after the time had been twice extended was said to be inexcusable, and no explanation of the delay being given, the appeal ought to be dismissed, especially as the application was not made till after the defendant had given notice of motion for judgment. The Court of Appeal held the view that the plaintiff's application should be allowed and the costs therein should be incurred by the plaintiff. This was how Jessel MR put it on behalf of his fellow brothers (Cotton LJ and Sir James Hannen):
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> > According to the usual practice of the court, the plaintiff's application ought to have been granted by the Vice-Chancellor. The plaintiff was out of time, and in that case if a motion is made for judgment on admissions in the pleadings, or if the analogous step is taken of a motion to dismiss for want of prosecution, the usual course is to give the plaintiff time to take the next step upon his paying costs; which is a sufficient punishment, and will prevent the rules from becoming a dead letter. This course will not be departed from unless there is some special circumstances such as excessive delay. In the present case there was no extraordinary delay, the original time for delivering reply not having expired till 25 July. The application ought to have been granted on the terms of the plaintiff paying the costs of it. Our order now will be that the delivery of reply on 28 October shall stand, the plaintiff paying the costs of the application to the Vice-Chancellor, but having his costs of the appeal.
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> Relying on *Eaton v. Storer* [1882] 22 Ch D 91, Mr Sanjay argued that his application ought to be granted by this court as the necessary costs should be ordered in favour of the plaintiff. On the facts, however, *Eaton v. Storer* could easily be distinguished. There the facts were not in regard to adducing further evidence like the case presently before me. There it involved an enlargement of time to file a reply to the statement of defence. There, unlike here, there was no allegation of the negligence of counsel that conducted the matter.
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> Again it was sought to argue that no matter how late an application by an applicant may be, any injury caused by such a delay may be compensated by the payment of costs. By way of an analogy the case of *Atwood v. Chichester* [1878] 3 QBD 727 was referred to. Briefly the facts in that case were that the

defendant, a married woman having a separate estate without power of anticipation, signed at the request of her husband a cheque and also a bill of exchange. Her husband negotiated these documents with the plaintiff for valuable consideration. The amount thereof remaining unpaid, the writ of summons in the present action was issued and served upon the defendant. She handed it to her husband who promised to attend to it. No appearance having been entered, judgment was signed on 19 October 1876. A summons taken out to set aside the judgment was dismissed on 30 July 1877, by a master. Field J, on 3 August 1877, made an order that the defendant should pay the debt by instalments. A summons was taken out on 9 November 1877 to commit the defendant for non-payment of the instalments, and on 26 November 1877, a summons to set aside the judgment in the action was dismissed by Pollock B. The defendant appealed on 21 December 1877 to the Queen's Bench Division, which refused to interfere. The defendant appealed to the Court of Appeal. In a separate judgment, Bramwell LJ had this to say:

> It is clear that if the defendant had made an early application to set aside the judgment, she would have been allowed to defend upon proof that her conduct has been *bona fide*. Her defence is not technical, nor does it resemble an objection that an action has been brought too soon. The defence is meritorious and substantial. By the law of this country a married woman cannot bind herself except by binding her separate property – she cannot bind herself personally. It is plain that a mere omission to enter an appearance within due time would not have been a bar to an early application. But it has been argued that the defendant is now too late. When sitting at chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but that in other cases the objection of lateness ought not to be listened to, and any injury caused by the delay may be compensated for by the payment of costs. This I think is a correct view. Here the action in its present form is not maintainable, and it must be taken that when the plaintiff issued the writ, he knew that he could not succeed: what harm will it be done to the plaintiff by allowing the defendant to appear? The objection of lateness ought not to be allowed to prevail. But then has her conduct been *bona fide*? Has she acted merely with want of care and through ignorance, or did she really intend to suffer judgment and make herself liable upon the documents which she had signed? Upon that facts I come to the conclusion that the defendant did not intend to make herself liable in this action: she has not acted *mala fide*, but she has a good and meritorious defence, and the plaintiff must have known that he could not succeed. With all respect to the Queen's Bench Division, I agree with the decision'.

I must sound a note of warning. The case of *Punca Klasik Sdn Bhd v. Seok Kim Leow (supra)* was in regard to an attempt at introducing fresh evidence, nevertheless in the context of the present case it would not be out of place

to refer to that case because that case covered many aspects of the law. Again at p. 252 to p. 253 of *Punca Klasik Sdn Bhd v. Seok Kim Leow (supra)*, I too had occasion to deliberate on O. 3 r. 5(1) of the RHC and this was what I said:

> Order 3 r. 5(1) of the RHC gives the Court the discretion to extend time and it states explicitly that:
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> > The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.
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> In practice, an application to extend time is generally allowed provided no injustice is caused and the other party can be compensated by costs. However, there must always be before the court cogent material to satisfactorily explain the delay before the court will exercise its discretion to extend time: *Thamboo Ratnam v Thamboo Cumarasamy & Anor* [1965] 1 WLR 8. Thus, when an applicant failed to advance any reason as to why the writ was not served during the period of its validity, the court would not readily exercise its discretion in favour of extending time to renew the writ: *Lloyd Triestino Societa v. Chocolate Products (M) Sdn Bhd* [1976] 2 MLJ 27, FC. From the authorities both foreign and local, two distinct principles can be garnered. The first principle is the time honoured principle that the rules of court and the associated rules of practice, devised by the Rules Committee and developed by the courts over the years to promote the expeditious despatch of litigation, must be rigidly observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but rather requirements set which should be met rigidly by the parties thereto. This time honoured principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit. Thus, O. 19 r. 1 of the RHC (default in service of statement of claim), O. 24 r. 16(1) of the RHC (failure to comply with requirement for discovery etc), O. 25 r. 1(4) of the RHC (failure of plaintiff to take out summons for directions, then the defendant may apply to dismiss the action), O. 28 r. 10(1) of the RHC (failure to prosecute proceedings with despatch), and O. 34 r. 2(2) of the RHC (failure of the plaintiff to set down action for trial, the defendant may set down the action for trial or may apply to the court to dismiss the action for want of prosecution) are some examples set by the Rules Committee. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.
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> The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is clearly reflected in the general discretion to extend time conferred by O. 3 r. 5(1) of the RHC as reproduced earlier on, and this discretion is to be exercised in accordance with the requirements of justice in the particular case. Broadly stated this principle is also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.

Incidentally, the case of *Punca Klasik Sdn Bhd v. Seok Kim Leow* was also reported in the Current Law Journal *vide* [1996] 4 CLJ 399. Zakaria Yatim J (as he then was) in *Asia Commercial Finance (M) Bhd v. Pasadena Properties Development Sdn Bhd & Ors* [1991] 1 MLJ 111 at 116 said:

> In *Gan Hay Chong v. Siow Kian Yuh & Anor* [1975] 2 MLJ 129, the Federal Court held that the mistake of the appellant's solicitors in that case did not constitute a sufficient ground for granting the extension of time.

and this was said in the context of a mistake by the lawyer, whereas in the present appeal the judgment debtor said that he did not receive any letter from his lawyer regarding the issue of extending the duration of the stay proceedings and that by the time he received the letter it was too late in the day. Since there was no complaint that the postal services were instrumental for the delay, I need not dwell on it at all. My attention was also drawn to the case of *KS Chua & Co v. Chui Miang Chew & Ors* [1996] 2 CLJ 676, [1995] 4 MLJ 436, [1995] 3 AMR 2605 where the defendants there applied to dismiss the plaintiffs' claim for want of prosecution. In *KS Chua (supra)*, the amended defence and counterclaim of the second and sixth defendants were served on the plaintiffs' solicitors on 25 April 1990. As at 6 May 1990 – the time when pleadings were deemed to be closed, no reply nor defence to counterclaim had been filed and served by the plaintiffs. Yet the plaintiffs in that case sought to file and serve a reply and defence to counterclaim dated 8 June 1994. The delays in that case computed after the date of the last service of the amended defence and counterclaim of the second and sixth defendants were more than four years. At p. 447 of the report as reported in the MLJ, the court said:

> In *United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1994] 2 AMR 32: 1653, his Lordship Mohamed Dzaiddin SCJ (now FCJ), after considering the various authorities on the subject of dismissal of an action for want of prosecution including *Birkett v James (supra)* was prepared to overlook the delay and ordered that the case proceeded for trial simply because there was an 'earnest desire of both parties to reach an amicable settlement which did not succeed.' It is quite obvious that the present case can easily be distinguished from *United Malayan Banking Corporation Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors (supra)* in that here both parties did not negotiate for a settlement. Here, the mistake was entirely that of Reginald Vallipuram who procrastinated as to cause serious prejudice to the defendants.
>
> From the authorities, what constitutes inordinate delay is a question of fact and as a rule, until a credible excuse is made out, the irresistible inference is that that delay is patently inexcusable. As Lord Denning MR in *Allen v. Sir Alfred McAlpine & Sons Ltd* [1968] QB 229 succinctly said :
>
> > When the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away.

> From the recital of the facts, it is my judgment that the plaintiffs took time in prosecuting their claims after the case was transferred to the High Court on 6 May 1990 and such delay was, in the circumstances, prolonged, inordinate and inexcusable. Public policy demands that the business of the courts should be conducted expeditiously. The plaintiffs clearly procrastinated and they authored their own downfall by not expeditiously prosecuting their claims.

I am acutely aware of the curative powers of the High Court under O. 92 r. 4 of the RHC "to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court". For further elucidation, it may be recommended to read the following two cases:

(1) *Keymer v. Reddy* [1912] 1 KB 215 at 221; and

(2) *Samuels v. Linzi Dresses Ltd* [1981] QB 115.

Must I exercise my discretion and invoke O. 92 r. 4 of the RHC in favour of the judgment debtor? Certainly not.

The present appeal had a chequered history. It had at one time proceeded straight to the Federal Court. The judgment debtor was full of energy – putting barriers from the very beginning. At the end of the day, the scenario was rather bleak. The judgment debtor was declared a bankrupt on 5 December 1996 when the receiving and adjudication orders were issued against him. There was a failure on the part of the judgment debtor to comply with the requirements of a bankruptcy notice no: 1131/89 dated 30 December 1989. Lord Morris in *Connelly v. DPP* [1964] AC 1254 aptly said:

> There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

In *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd* [1984] 2 MLJ 143 at 147, Edgar Joseph Jr J (as he then was) said that:

> It is also clear that the inherent jurisdiction of the court includes all the powers that are necessary 'to fulfil itself as a Court of Law'; 'to uphold, to protect, and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner': Jacob, The Inherent Jurisdiction of the Court – (1970) 23 Current Legal Problems, 23, 27 and 28.

But the scope of inherent powers of the court have been whittled down by Syed Agil Barakbah SCJ in *Permodalan MBf Sdn Bhd v. Tan Sri Datuk Seri Hamzah bin Abu Samah & Ors* [1988] 1 MLJ 178. At p. 181 of the report, his Lordship succinctly said that:

> We read this to mean that the rules cannot interfere with the exercise of the inherent powers by the court so long as it deems it necessary to prevent any injustice or any abuse of its own process. It follows that where the rules contain provisions making available sufficient remedies, the court will not invoke its inherent powers.

In *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339; [1995] 2 AMR 1174; [1995] 2 MLJ 287, I did say to the effect that the court will not apply its inherent powers under O. 92 r. 4 of the RHC to all cases indiscriminately but rather the court is duty bound to determine the issues in dispute as far as they affect the rights and interests of the parties. I am constrained to adopt the same approach and attitude in regard to the present appeal in encl. 52.

In *Lloyd Triestino Societa v. Chocolate Products (Malaysia) Sdn Bhd* [1978] 2 MLJ 27, FC, the court simply refused to renew the writ in the absence of any reason being given for the failure to serve the said writ within the period of its validity. At p. 28 to p. 29 of the report, Chang Min Tat FJ speaking for the Federal Court had this to say:

> On the question of whether the respondents had advanced good grounds to merit the exercise of the court's discretion in their favour, the learned judge after citing this paragraph from the affidavit of Mr. Charles Ong, the respondents' solicitor, that
>
> > Pending the outcome of the action against the sellers the writ herein was filed to preserve the plaintiff's claim against the carriers of the hazel nuts, so that the limitation period would not operate to bar the plaintiff's claim against the carriers,
>
> thought, against the contention of the appellants that he had no reason to disagree with the Senior Assistant Registrar's acceptance of it as a good reason.
>
> Since the Senior Assistant Registrar had not stated in writing his grounds for renewing the writ, we are unable to ascertain that he had considered the question of or the necessity for good grounds and if he had, what he had regarded as good grounds. But the learned judge, accepting the excuse advanced by Mr. Charles Ong, thought the necessity to preserve the claim a good ground. With the greatest of respect, he was mistaking the wish for the deed. If time had to be stopped running, by the issue of the writ, surely the easiest way to continue to stop time from running and thus preserve the right of action, would be to serve the writ within the 12 months of its life. There might be in some cases difficulties in effecting service. Such difficulties could amount in the circumstances to good reasons. But this was not a case of any difficulty in effecting service. Mr. Charles Ong at the hearing of the appeal advanced a further reason when in answer to a question by the court he advised that the reason for failing to serve was that the parties were negotiating. If he was in contact with the other party or with the solicitors of the other party, there would not be

the slightest difficulty in effecting service. Of course, he wanted to preserve the cause of action but he did absolutely nothing to do so. He had failed to keep his powder dry and if his gun misfired, he had only himself to blame.

In our view, the respondents had not advanced a single reason, much less a single good reason for the exercise of the court's discretion in renewing the writ and the discretion ought not therefore to be exercised. We agree with the approach in *New Ching Kee v. Lim Ser Hock* [1975] 2 MLJ 183 and we accordingly allowed the appeal with costs here and in the court below and ordered that the application to renew the writ be dismissed.

Now, *Serangoon Garden Estate Ltd v. Ang Keng* [1953] MLJ 116; *Wilson v. Church* (No 2) [1879] 12 Ch D 454, CA; *Monk v. Bartram* [1891] 1 QB 346, CA; *Tuck v. Southern Counties Deposit Bank* [1889] 42 Ch D 471, CA; and *Griffiths v. Benn* [1911] 27 TLR 346 CA were cases which dealt specifically with applications for stay of executions. The present appeal revolved on the extension of the stay of the bankruptcy proceedings until 31 December 1998. The delay which had been alluded to must surely be the stumbling block for the judgment debtor. This brings to the forefront the sage words of Lord Chelmsford in the case of *Nawab SN Ally Khan v. Rajah O Khan* [1865] LR 1 PC 8, 11, [1865] X Moore Ind App 322, 327:

… that any application for a stay of proceedings must be founded upon two points, which are essential to sustain the application: first, that a serious injury will be the result of the party applying unless the stay of proceedings is granted, and secondly, that the party has come promptly to make the application for delay.

On the available evidence, I so hold and it was my judgment that there was an inordinate delay on the part of the judgment debtor to file an application for the extension of the stay of the bankruptcy proceedings. Lack of promptness on the part of the judgment debtor was a major factor to be considered and weighed. The aggravating factor which tilted the scale in favour of the judgment creditor was the fact that the judgment debtor failed to satisfy me that serious injury would befall him if the stay was not granted. In *Datin Melati Abdullah & Ors v. Syed Hassan Syed Salim* [1999] 5 CLJ 582, particularly at pp. 589 and 590, the court said:

The defendant here sought to enlarge time and this court certainly has an inherent jurisdiction to extend time independently of O. 3 r. 5 of the RHC (*Keymer v. Reddy* [1912] 1 KB 221 CA; *Pole-Carew v. Western Counties Manure Co Ltd* [1919] 89 LJ Ch 100 CA). Of course, if there was consent all round, time can easily be extended (*Australasian Automatic, etc, Co. v. Walter* [1891] WN 170). It was not the case here. It is obvious that the object of O. 3 r. 5 of the RHC is to give the court the all pervading discretion to extend time with a view, solely, to avoid injustice to the aggrieved parties (*Schafer v. Blyth* [1920] 3 KB 143; and *Saunders v. Pawley* [1885] 14 QBD 234). Bramwell LJ did say in *Attwood v. Chichester* [1878] 3 QBD 723 CA that:

> When an irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who has failed to act within the proper time ought to be the sufferer, but in other cases the objection of lateness ought not to be listened to and any injury caused by delay may be compensated for by the payment of costs.

> However, where there is excessive delay the court may be induced to exercise its discretion to refuse to extend time (*Eaton v. Storer* [1882] 22 Ch D 92 CA). All things being equal, I prefer the principle of law enunciated in *Ratnam v. Cumarasamy* [1965] 1 WLR 8; [1964] 3 All ER 933 PC and it may be paraphrased in these words. The Rules of the Supreme Court as to time have to be observed strictly, and if substantial delay occurs without any explanation being offered, the court is certainly entitled, in the exercise of its judicial discretion, to refuse the extension of time. And this is so even though the delay could be compensated for by costs and notwithstanding that no injustice would be done to the other party.

An argument was advanced to the effect that the judgment creditor did not file an appeal against the decision of the SAR that was handed down on 14 May 1997, yet the judgment creditor saw it fit to file an appeal against the decision of the SAR that was delivered on 8 August 1998. It certainly cannot be said that the judgment creditor had waived its right to appeal in regard to the decision of the SAR dated 8 August 1998 just because it had not appealed against the decision of the SAR dated 14 May 1997. I must reject this kind of argument forthwith. Any party aggrieved by the decision of the decision maker has an inherent right of appeal. That right can never be whittled down nor waived by the aggrieved party. There was no abandonment of the right by the judgment creditor to appeal against the decision of the SAR dated 8 August 1998. It is said that a waiver is an intentional act accompanied with knowledge (see the speech of Lord Chelmsford LC in *Earl of Darnley v. London, Chatham and Dover Rly Co. (Proprietors etc)* [1867] LR 2 HL 43 at 57; and *Auckland Harbour Board v. Kaihe* [1962] NZLR 68 at 88 (NZCA)). There was no evidence that the judgment creditor had given a promise or an assurance that the decision of the SAR dated 8 August 1998 would not be appealed against (*Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130; *Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd* [1954] 2 All ER 28, [1954] 1 WLR 862 CA, which was unfortunately reversed on the question of the notice required to terminate the waiver [1955] 2 All ER 657, [1955] 1 WLR 761, HL). There was nothing on record to indicate that the judgment creditor had by conduct made it inequitable to proceed with the idea of appealing against the decision of the SAR dated 8 August 1998. The concept of implied waiver cannot be applied to the facts of the present appeal. This was my judgment and I so hold accordingly.

The principles on the stay of proceedings have been ventilated in the case of *Punca Klasik Sdn Bhd* [1996] 4 MLJ 533 where the special circumstances approach was preferred to that of the nugatory approach. N H Chan JCA in *Tropiland Sdn Bhd v. DCB Bank Bhd & Ors* [2000] 2 MLJ 65 seemed to prefer the special circumstances approach and at p. 69 of the report, his Lordship said:

> We also found that the plaintiff has not shown any special circumstances for a stay to be ordered. We were fortified in our decision by the Federal Court case of the *Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1976] 1 MLJ 131 which refused the application for stay as no special circumstances were shown to support the application for stay.

Be that as it may, one pertinent question that would be crucial in deciding encl. 52 would be this: what were the special circumstances in favour of the judgment debtor that would support the SAR's decision dated 8 August 1998 when the SAR extended the stay of the bankruptcy proceedings until 31 December 1998? The affidavit of the judgment debtor in encl. 50A indicated that the desire for the stay was to await for the outcome of civil suit no: D2-22-287-92 at the Kuala Lumpur High Court. In my judgment, this was not a reason that ought to be accepted in deciding whether a stay of the bankruptcy proceedings until 31 December 1998 should be allowed or not.

There were other inconsequential submissions that need not be repeated in this judgment. Suffice to say that Madam Norliza bte Ibrahim for the judgment creditor rightly pointed out that the judgment creditor should not be deprived of pursuing the matter further especially when the adjudication and receiving orders were made against the judgment debtor on 5 December 1996. It may be added that the decision of the SAR would certainly deter the judgment creditor from recovering the debt that was due and owing to them from the judgment debtor. The judgment creditor should not be deprived of pursuing the matter further in order to seek justice against the judgment debtor. No court of law would deprive the judgment creditor of their rightful legal right. Thus far, the judgment creditor has acted in a "regular, orderly and effective manner" – following closely the judicial process of the country. That should be applauded.

I reiterate that the appeal in encl. 52 by the judgment creditor should be allowed with costs.